

PUBLICATION

Extension of Time for Overpayment Recoveries in Fiscal Cliff Law Not as Broad as it Sounds [Ober|Kaler]

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The recently passed fiscal cliff legislation, i.e., the American Taxpayer Relief Act of 2012 (Act), includes a number of provisions addressing Medicare and Medicaid. One of these provisions extends the recovery period for the collection of overpayments under certain circumstances. Specifically, section 638 of the Act amends section 1870 of the Social Security Act and addresses the period of time that providers are deemed to be “without fault,” and thereby protected from having to repay overpayments.

Under the old law, a provider was deemed to be without fault beginning three years after the year in which notice of the original payment was made to the provider, unless there was evidence to the contrary. Under the new law, the no fault status does not attach until five years after the year in which notice of the original payment is made. Although this appears to give the government two more years to go after overpayments, in reality the expansion of the time period does not ultimately give the government that much additional opportunity to recover overpayments.

There are two separate laws that are applied together to determine the period of time a provider is subject to recovery of an overpayment: the reopening laws and the recovery laws, as discussed more fully below. Section 638 of the Act addresses only the recovery provisions.

- Reopening laws: Reopening periods are governed by section 1869(b)(1)(G) of the Social Security Act, which grants the Secretary of Health and Human Services (Secretary) the authority to set the reopening periods. The Secretary has set the reopening periods by regulation as four years from the date of payment for claims determinations (42 C.F.R. § 405.980(b)(2)) and three years from the date of the final determination (i.e., the Notice of Program Reimbursement) for cost report determinations (42 C.F.R. § 405.1885), in the absence of fraud or similar fault.
- Recovery laws: Once a payment determination has been reopened, contractors may then seek to recover the overpayment. Section 1870 of the Social Security Act governs the recovery of overpayments. This section bars recover of overpayments from providers that are “without fault.” Prior to the passage of the new law, the statute deemed providers to be without fault beginning three years after the year in which notice was sent of the amount paid, unless there was evidence to the contrary of fault.

Thus, under the old law, a contractor could reopen a claim determination that was four years old, but would be restricted in its ability to recover to the extent the provider was deemed to be without fault beyond three years from the notice of the amount paid. Under the new law, the without fault provision does not kick in until five years after notice of the payment. This will allow contractors to go back an additional year for claims purposes, i.e., to the full reopening period of four years. It will not, however, allow any additional recover in the cost reporting situation as that reopening period is limited generally to three years.

The change in the law may have been prompted by a recent report of the Office of the Inspector General (OIG). In [a report dated May of 2012](#), the OIG recommended that CMS pursue legislation so that the recovery period exceeds the reopening period for Medicare payments. Not coincidentally, the title of the report,

“Obstacles to Collection of Millions in Medicare Overpayment,” sounds strikingly similar to the title of Section 628, “Removing Obstacles to Collection of Overpayments.”

Comments

Although on first blush the wording of the new provision – and particularly its title – suggests that it could have a major impact on the recovery of overpayments, in reality that effect is tempered by several factors. First, the reopening provisions must be considered, and they restrict reopenings and resulting recoveries to four years for claims determinations and three years for cost report determinations, in the absence of fraud or similar fault. In addition, the change in the law affects only those circumstances when providers are deemed to be “without fault,” which is not commonly applied by the Secretary in the recovery of overpayments, as the Secretary usually finds that a provider was or should have been on notice that it was not entitled to the payment at issue, and thus was “at fault.”